

Adopt Ph 200, previously effective 2-5-96 (Doc. #3181-B), and expired 2-5-04, to read as follows:

CHAPTER Ph 200 PRACTICE AND PROCEDURE

PART Ph 201 INTRODUCTION AND DEFINITIONS

Ph 201.01 Procedure Governed. This chapter governs practice and procedure before the board in both adjudicative and non-adjudicative proceedings.

Ph 201.02 Definitions.

(a) "Adjudicative proceeding" means the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.

(b) "Board" means the New Hampshire pharmacy board.

(c) "Declaratory ruling" means a ruling by the board as to the specific applicability of any statutory provision or of any rule or order of the board.

(d) "Licensee" means a person, partnership, corporation, or any other legal or commercial entity however organized, duly licensed by the board pursuant to the provisions of RSA 318, RSA 318-B, or other applicable law.

(e) "Opponent" means any person who objects, on the grounds of public or private interest, to the approval, determination, consent, certification or authorization of any petition which the board might have under consideration.

(f) "Party" means each person named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party in an adjudicative proceeding.

(g) "Presiding officer" means the board president or an individual to whom the board president has delegated the authority to preside over an adjudicative proceeding, a rehearing, or a rulemaking hearing.

(h) "Proponent" means any person who supports, on the grounds of public or private interest, the approval, determination, consent, certification or authorization of any petition which the board may have under consideration.

PART Ph 202 FILING AND SERVICE OF DOCUMENTS

Ph 202.01 Filing of Documents.

(a) A document shall be considered filed when it is actually received at the board's office in Concord and conforms to the requirements of this chapter.

(b) All documents filed shall be either originals or legible copies bearing original signatures. Only a single copy of routine correspondence, license applications, and consumer complaints against licensees shall be filed.

Ph 202.02 Subscription and Veracity of Documents.

(a) All complaints, petitions, motions, and replies filed with the board shall be signed by the proponent of the document or, if the party appears by a representative, by the representative.

(b) The signature on a document filed with the board shall constitute a certification that:

- (1) The signor has read the document;
- (2) The signor is authorized to file it;
- (3) To the best of the signor's knowledge, information, and belief, there are good grounds to support it; and
- (4) The document has not been filed for purposes of delay or harassment.

Ph 202.03 Service of Documents.

(a) Complaints against licensees of the board shall be filed with the board without service upon the licensee which is the subject of the complaint.

(b) Petitions for rulemaking and petitions for declaratory rulings shall be filed with the board without service upon other persons.

(c) All motions, replies, exhibits, memoranda, or other documents filed in an adjudicatory proceeding shall be served by the proponent upon all parties to the proceeding by:

- (1) Sending a copy of the document by U.S. mail, first class postage prepaid, addressed to the last address given to the board by the party being served, no later than the day the document is filed with the board; or
- (2) Delivering a copy of the document in hand on or before the date it is filed with the board.

(d) All notices, orders, decisions or other documents issued by the board in the course of an adjudicatory proceeding shall be served by the board upon all parties to the proceeding by either:

- (1) Sending a copy of the document by U.S. mail, first class postage prepaid, addressed to the last address given to the board by the party being served; or

- (2) Delivering a copy of the document in hand to the party.
- (e) When a party has appeared by a representative, service shall be upon the representative.
- (f) Except for exhibits distributed at a prehearing conference or a hearing, every document filed with the board and required to be served upon the parties to an adjudicatory proceeding shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service, and the persons served.

PART Ph 203 HEARINGS AND PROCEEDINGS

Ph 203.01 Representatives.

- (a) Any person may represent himself/herself in a proceeding before the board or may be represented by an attorney or a competent individual of good character.
- (b) A representative under (a) above shall be someone who:
 - (1) Is an attorney holding a current and active New Hampshire license who has filed a written appearance with the board containing his or her business address and telephone number; or
 - (2) Is not a New Hampshire licensed attorney, but has filed a motion for leave to appear as a representative which has been granted by the board.
- (c) Motions made pursuant to Ph 203.01 (b)(2) shall:
 - (1) Describe the proposed representative's qualifications including, but not limited to, the following:
 - a. Education;
 - b. Experience serving in a representative capacity before administrative agencies, boards, or commissions; and
 - c. Present employment.
 - (2) Provide the proposed representative's daytime address and telephone number; and
 - (3) Be signed by both the proposed representative and the party who would be represented.
- (d) The board shall grant a motion made pursuant to Ph 203.01 (b) (2) if the proposed representative:

- (1) Has had experience representing others in administrative proceedings; and
 - (2) Does not have a history of dishonesty or felonious acts.
- (e) Nothing in this section shall be construed to permit the unauthorized practice of law.

Ph 203.02 Computation of Time. Any time period specified in this chapter shall begin with the day following the act, event, or default, and shall include the last day of the period, unless it is a Saturday, Sunday, or state legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or state legal holiday. When the period prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and state legal holidays shall be excluded from the computation.

Ph 203.03 Change in Allowed Times.

(a) Except where a time period is fixed by statute, a party may file a motion to change a time period which shall set forth specific facts to support their request to enlarge or shorten the time provided for the filing of any document, or advance or postpone the time set for any oral hearing, prehearing conference, or other activity.

(b) The board shall grant such motion:

- (1) If all parties consent; or
- (2) For good cause shown from the facts presented.

(c) Good cause under (b) (2) above shall include the following:

- (1) Unavoidable unavailability of witnesses, parties, their attorneys, or their authorized representatives; or
- (2) Other exigent circumstances beyond the control of the parties, their attorneys, or their representatives.

(d) A consent of the parties under (b)(1) above shall be:

- (1) Made in writing;
- (2) Signed by all parties; and
- (3) Filed with the board prior to a scheduled date or the expiration of a time period.

Ph 203.04 Recess and Adjournment.

(a) The presiding officer shall recess or adjourn any proceeding for good cause, which shall include but not be limited to the following:

- (1) Other exigent business of the board;
- (2) The end of the business day; or
- (3) Inclement weather.

Ph 203.05 Waiver.

(a) Any interested person may request the board to waive or suspend provisions of the Ph 200 rules by filing an original and 2 copies of a petition which identifies the rule in question and sets forth specific facts and arguments which support the requested waiver.

(b) Petitions for rule waivers shall address whether:

- (1) Adherence to the rule would cause the petitioner hardship. "Hardship" in this context means that because of petitioner's unique circumstances strict adherence to a rule would be unreasonable or result in unfair advantage to another party.
- (2) Other good cause for waiving the rule exists. "Good cause" in this context shall include the following:
 - a. Repeal or amendment of the enabling statute for provisions of rules from which a waiver is sought; or
 - b. Other circumstances which render a rule inapplicable, unenforceable, or illegal.

(c) If examination of the petition reveals that other persons would be substantially affected by the proposed relief, the board shall require service of the petition on such persons and advise them that they may file a reply to the petition.

(d) Petitions for waiver shall be acted upon by the board within 45 days of receipt. The board shall give written notice of the decision to all interested parties.

(e) A granted waiver shall only apply to the proceedings under review at the time of the petition.

(f) Provisions of Ph 200 rules which include provisions of New Hampshire statutes shall not be waived unless all parties consent.

(g) A consent of the parties under (f) above shall:

- (1) Be made in writing;
- (2) Identify the specific rule provision to which the waiver applies;
- (3) Be signed by all parties; and
- (4) Be filed with the board.

Ph 203.06 Docket. The board shall maintain a docket of all proceedings, hearings, and rehearings pending before the board.

Ph 203.07 Consolidation.

- (a) A party may file a motion to consolidate whenever 2 or more proceedings involve substantially similar or related issues.
- (b) A motion to consolidate may include a request for a single hearing, a single decision, or both.
- (c) The board shall grant a motion to consolidate upon finding that:
 - (1) A requested consolidation would further the interests of fairness and efficiency; and
 - (2) A requested consolidation would not impair consideration of the issues presented by each individual matter.

Ph 203.08 Severance.

- (a) A party may file a motion to sever one or more issues from a proceeding and dispose of those issues in another proceeding whenever it shall appear that injury to the substantive rights of a party or undue delay might be thereby avoided.
- (b) The board shall grant a motion for severance upon finding that:
 - (1) A requested severance would further the interests of fairness and efficiency; and
 - (2) A requested severance would not impair the proceeding from which the issue or issues are removed.

PART Ph 204 ADJUDICATIVE PROCEEDINGS

Ph 204.01 Applicability. This part shall govern adjudicative proceedings before the board.

Ph 204.02 Place of an Adjudicative Proceeding. Adjudicative proceedings before the board shall be held at the offices of the board, 57 Regional Drive, Concord, New Hampshire.

Ph 204.03 Commencement of Adjudicative Proceeding.

(a) Pursuant to RSA 541-A:31, II, the board shall commence an adjudicative proceeding at any time as a result of the following actions by a licensee:

- (1) Failure to file requisite reports within 30 days of applicable deadlines;
- (2) Failure to pay fees or fines within 60 days of invoice date;
- (3) Engaging in licensed activity with a suspended, revoked, or expired license;
- (4) Failure to allow board personnel access, authorized by law, to the books, papers, records, files or similar documents for purposes of conducting examinations; or
- (5) Any other failure to comply with the laws, rules or orders of the board governing the licensee's activities.

Ph 204.04 Notice.

(a) Notice of an adjudicative proceeding shall be governed by the following provisions, unless otherwise provided by law:

- (1) The Board shall give written notice to a party at least 30 days prior to a scheduled hearing date by first class mail, postage prepaid, or by personal service upon a party or a party's agent;
- (2) Contents of the notice shall be governed by the provisions of RSA 541-A:31, III.

Ph 204.05 Emergency Orders.

(a) Pursuant to RSA 541-A:30, III, if the board finds that public welfare requires emergency action against a licensee, and the board incorporates a finding to that effect in an order, the board shall order the immediate suspension of a license pending an adjudicative proceeding which shall be commenced not later than 10 working days after the date of the board's order suspending the license.

(b) An emergency order shall be served upon the licensee by certified mail-return receipt requested, or by personal service upon the licensee, or by personal service upon the licensee's agent as identified on the most recent license application submitted to the board.

Ph 204.06 Intervention

(a) A person filing a complaint which becomes the subject of a disciplinary hearing shall be served with the hearing notice and notified that he/she may petition to intervene in the proceeding.

(b) The board shall grant one or more petitions for intervention if:

(1) The petition is submitted in writing to the board, with copies mailed to all parties named in the notice of hearing, at least 3 days before the hearing;

(2) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding; and

(3) The interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

(c) Once granted leave to intervene, and intervenor shall have the status of a party and shall enter the proceeding as it stands at the time. No portion of the proceeding shall be repeated because of the fact of intervention.

Ph 204.07 Access to Board Records

(a) Parties shall have access to any statements, documents, or other information in the board's files pertinent to an adjudicative proceeding. However, confidential information pursuant to RSA 383:10-b, consumer complaints pursuant to RSA 383:10-e, and confidential material otherwise protected by law shall not be disclosed or provided to any party other than the board.

(b) In any case in which an intervenor has been admitted as a party, the intervenor shall have access to all materials permitted by Ph 204.07 (a).

Ph 204.08 Filing Requirements. Copies of all documents, pleadings, motions, objections, requests, memorandums, correspondence, accounts, and the like, which are filed by a party with the board shall be provided to other parties to the same proceeding as follows:

(a) A party shall send copies of all documents filed by first class mail, postage prepaid, to all other parties, or shall deliver such documents in hand to all other parties; and

(b) A party shall certify compliance with Ph 204.08 (a) by submitting a certificate of service with the documents filed.

Ph 204.09 Stipulations. The parties to an adjudicative proceeding may by written stipulation agree upon facts or issues of proof relating to the subject matter of the proceeding. The stipulation shall be filed with the board and approved by the presiding officer in order to be considered in rendering a decision.

Ph 204.10 Evidence.

(a) Proceedings shall not be conducted under the rules of evidence, but the evidentiary privileges recognized by the law of New Hampshire shall apply to proceedings under this chapter.

(b) Pursuant to RSA 541-A:33, II, the board shall receive all material and relevant evidence bearing upon the subject matter of the proceeding.

(c) The presiding officer shall determine the admissibility of evidence and shall exclude irrelevant, immaterial or unduly repetitious evidence.

(d) All witnesses appearing before the board shall testify under oath or affirmation upon penalty of perjury.

(e) Oaths or affirmations shall be administered by the presiding officer.

Ph 204.11 Hearing Procedure.

(a) After calling the hearing to order, the presiding officer shall identify the proceeding for the record by name and docket number, shall briefly state the nature of the proceeding, and shall request those present to identify themselves for the record.

(b) The presiding officer shall afford an opportunity for opening statements or direct testimony by the board representative and the licensee or licensee's representative.

(c) After any opening statements, the board representative shall present witnesses and exhibits, followed by presentation of witnesses and exhibits by the licensee or licensee's representative.

(d) Opportunity shall be afforded to either party to cross-examine each witness of the other party at the conclusion of the witness's direct testimony.

(e) The presiding officer shall if additional information is required pose questions to any witness during or subsequent to direct testimony or cross-examination.

(f) After all testimony and evidence is presented, the presiding officer shall allow closing statements by the board representative and by the licensee or licensee's representative.

(g) After all information has been presented, the presiding officer shall declare the hearing closed.

(h) The presiding officer shall afford intervenors the same opportunities for presenting testimony, evidence, or witnesses, and for conducting cross-examinations and for making closing statements as other parties to the proceeding.

Ph 204.12 Burden of Proof

(a) The party asserting the affirmative of a proposition shall have the burden of proving the truth of that proposition by a preponderance of the evidence.

(b) Without limiting the generality of Ph 204.12 (a), all moving parties and all petitioners shall have the burden to show that their motion or petition should be granted.

Ph 204.13 Decisions.

(a) If the board finds that the licensee has complied with the statutory requirements and the rules adopted pursuant thereto, the board shall enter a decision favorable to the licensee.

(b) If the board finds that the licensee has not complied with the statutory requirements or any rule adopted pursuant thereto, the board shall enter a decision adverse to the licensee.

(c) The board's decision shall be set forth in writing.

(d) The decision shall include findings of fact and conclusions of law, separately stated.

(e) If any party has submitted proposed findings of fact, the board's decision shall include a ruling on each proposed finding.

(f) The board shall give written notice of decisions to parties within 7 days after the date of decision by first class mail, postage prepaid.

Ph 204.14 Failure to Appear.

(a) Failure of a licensee to appear in person or by representative at the adjudicative proceeding shall constitute a default.

(b) A default for failure to appear shall constitute:

(1) A waiver of licensee's right to an adjudicative proceeding;

(2) Admission of the facts alleged; and

(3) Consent to the board's determination on the matter.

(c) The board shall strike a default for failure to appear based upon a written request and information submitted by the licensee within 7 days after the originally scheduled hearing date which sets forth good cause. Good cause shall include illness, accident, the death of family member, or other circumstances beyond the control of the licensee.

(d) The board shall give written notice to parties of a decision either to grant or deny a request to strike a default for failure to appear within 7 days of the date of decision by first class mail, postage prepaid.

(e) If a request to strike a default for failure to appear is granted, the board shall give notice of a re-scheduled hearing in accordance with Ph 204.04.

Ph 204.15 Informal Settlement.

(a) Any informal settlement of matters by nonadjudicative processes shall be reflected in writing and made part of the record for a particular matter.

PART Ph 205 REHEARINGS AND APPEALS

Ph 205.01 Motion for Rehearing.

(a) A motion for rehearing shall be considered only after a decision or order has been made by the board.

(b) Any party to the proceeding may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order.

(c) Motions for rehearing shall be filed with the board within 30 days of the date of the final decision or order.

(d) Motions for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable, or based upon a mistake of law or fact.

(e) A party may submit a memorandum of law in support of a motion for rehearing.

Ph 205.02 Action on Motion for Rehearing.

(a) Pursuant to RSA 541:5, within 10 days of receiving a motion for rehearing, the board shall render a decision either to grant or deny the motion, or suspend the order or decision complained of pending further consideration.

(b) Pursuant to RSA 541:3, the board shall grant such motion if good reason for the rehearing is provided.

(c) Good reason shall include, but not be limited to, the following:

(1) New information which was not available at the time of hearing;

(2) A change in law relied upon by the board in reaching a decision on the hearing, including amendment or repeal of statutes or administrative rules, and changes in common law based upon decisions of the supreme court; or

(3) Other factors beyond the control of the moving party causing the decision to be unreasonable or unlawful, or to be based upon a mistake of law or fact.

(d) The board shall give written notice of decision on a motion for rehearing to the parties within 7 days after the date of decision by first class mail, postage prepaid.

(e) If a motion for rehearing is granted, the board shall give written notice to the parties at least 30 days prior to the scheduled rehearing date by first class mail, postage prepaid, or by personal service.

Ph 205.03 Burden of Proof. The burden of proof shall be on the moving party to show by preponderance of the evidence that the board's decision was unlawful or unreasonable, or was based upon a mistake of law or fact.

Ph 205.04 Decisions.

(a) The board shall issue a written decision within 20 days of the date of the rehearing which clearly states the reasons for the decision.

(b) The decision shall include information on the rights of appeal to the supreme court pursuant to RSA 541, if the decision is adverse to the party who appeals.

PART Ph 206 DECLARATORY RULINGS

Ph 206.01 Petitions.

(a) A person may request a declaratory ruling from the board on matters within its jurisdiction by filing an original and 2 copies of a petition with the board.

(b) All petitions shall contain the following information:

- (1) The name and address of the petitioner;
 - (2) The name and address of the petitioner's representative, if any;
 - (3) A statement of the issue or question for which the petitioner seeks a declaratory ruling;
 - (4) A statement of all relevant and material facts related to the petitioner's request; and
 - (5) The identification of any statutes, rules, orders, or other legal authority which support the petitioner's request.
- (c) A petition for a declaratory ruling may include the following:
- (1) Legal memoranda, supporting affidavits, tables, exhibits, and other relevant documentation; and
 - (2) A statement explaining how the requested ruling would benefit the petitioner or the public at large.

Ph 206.02 Action on Petition.

- (a) Within 90 days of the receipt of the petition for a declaratory ruling, the board shall:
- (1) Respond to the petitioner in writing, stating the board's declaratory ruling on the issues or questions raised in the petition; and
 - (2) File the declaratory ruling with the director of legislative services in accordance with RSA 541-A:16, II (b).

PART Ph 207 RULEMAKING PETITIONS

Ph 207.01 Rulemaking Petitions.

- (a) A person may request the adoption, amendment, or repeal of a board rule by filing an original and 2 copies of a rulemaking petition with the board.
- (b) A rulemaking petition filed with the board shall include the following:
- (1) The name and address of the petitioner;
 - (2) The name and address of the petitioner's representative, if any;

- (3) A statement of the justification for the adoption, amendment, or repeal of a rule;
- (4) Any supporting data, information, exhibits, illustrations, or other documentation;
- (5) The identification of any statutes, rules, orders, or other legal authority which support the petition; and
- (6) A draft of the proposed rule.

Ph 207.02 Incomplete Rulemaking Petitions.

- (a) The board shall notify the petitioner of deficiencies in the petition within 15 days of the submission of a petition to adopt, amend, or repeal a rule.
- (b) Any corrected petition which is filed with the board shall be deemed to be the first submission of the petition for the purposes of applicable deadlines.

Ph 207.03 Action on Rulemaking Petition

- (a) Within 30 days after the submission of a rulemaking petition, the board shall either grant or deny the petition and shall:
 - (1) Notify the petitioner in writing of a decision to deny the petition with reasons for the denial clearly stated; or
 - (2) Notify the petitioner in writing of a decision to grant the petition, and commence rulemaking proceedings by requesting a fiscal impact statement pursuant to RSA 541-A:5 within 120 days of receipt of the petition and continuing the proceeding in accordance with the applicable provisions of RSA 541-A:3.
- (b) Any denial shall be based upon a finding by the board that:
 - (1) The petition for rule or amendment or repeal of an existing rule would not be consistent with established standards for the practice of pharmacy and the licensees of the board;
 - (2) The petition lacks rulemaking authority; or
 - (3) The petition is contrary to legislative intent.

PART Ph 208 RULEMAKING HEARINGS

Ph 208.01 Public Notice of Rulemaking Hearing. The board shall cause to be published in the New Hampshire Rulemaking Register a notice of its intent to conduct a rulemaking hearing pursuant to RSA 541-A:6.

Ph 208.02 Presiding Officer.

- (a) The presiding officer shall:
 - (1) Maintain order during the rulemaking hearing, and order any person causing disorder or a disruption to the orderly conduct of the hearing to leave the hearing room;
 - (2) Recognize speakers who have placed their names on the speakers list;
 - (3) Receive all written comment that is submitted during the course of a hearing; and
 - (4) Adjourn the hearing.

Ph 208.03 Order of the Rulemaking Hearing. The hearing shall proceed as follows:

- (a) The presiding officer shall make opening remarks;
- (b) Proponents of the adoption, amendment or repeal of the rule shall be called by the presiding officer to provide comment;
- (c) Opponents of the adoption, amendment or repeal of the rule shall be called by the presiding officer to provide comment;
- (d) After all persons wishing to comment have been heard, the presiding officer shall receive any written comment not previously submitted to the board; and
- (e) After all written comment has been collected, the presiding officer shall make closing remarks and adjourn the hearing.

Ph 208.04 Oral Comment.

- (a) Any proponent of or opponent to the adoption, amendment or repeal of a rule may make oral comment relative to such rule at the rulemaking hearing.
- (b) In order to be recognized at the hearing, any person wishing to comment shall sign the speakers list at the hearing and wait to be called by the presiding officer.

Ph 208.05 Written Comment.

(a) Any proponent or opponent may submit written comment to the board pertaining to the adoption, amendment or repeal of a rule.

(b) All written comment relative to proposed rulemaking shall be submitted to the board in accordance with the notice of rulemaking, which shall set forth a deadline allowing a minimum of 5 days time after adjournment of the rulemaking hearing.

(c) Written comment shall be submitted by filing an original and 2 copies with the board.